United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7537

United States Court of Appeals

FOR THE SECOND CIRCUIT

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P/S

YTZHAK HAREL,

Plaintiff-Appellee,

against

HARRY DIAMOND,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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Statement of Facts

Facts that are relevant to the instant appeal deal with the extent to which the plaintiff's injuries are permanent. The first testimony is given by Dr. Samuel Cohen, who is an orthopedic surgeon. Dr. Cohen examined the plaintiff on April 18, 1975; he testified that he asked the plaintiff to walk and that he was able to walk without a limp (page 22). He found no abnormality of the eyes or head (page 23). He performed a Romberg Test and found

no abnormalities (page 25). He examined the plaintiff's back, and found no spasm or pelvic tilt. He stated that the plaintiff was able to flex completely (page 25). The plaintiff was able to extend completely with a complaint of discomfort and was able to bend to both the left and right and twist his body both left and right (page 26). He did not find any limitation of motion (page 26). He examined the chest and found some tenderness in the left lateral chest wall. The plaintiff was able to breathe completely (page 26). The plaintiff showed no response to straight leg raising (page 27). There was no weakness in dorsi-flexion (page 27). There was some ankle tenderness. He could elicit no spasms or tenderness in the back area, (page 27). The neurological examination of the lower extremities was normal (page 28).

With regard to the Fordham Hospital record, Dr. Cohen testified that there was no record of consciousness or loss of consciousness in the record when the plaintiff was admitted.

Dr. Cohen was asked to view x-rays which were taken by the plaintiff's doctor, Dr. Horoszowski. He stated at page 32, that x-ray in evidence marked B1, showed a fracture of the transverse processes of the third and fourth lumbar vertebrae. He stated further that this x-ray did not show a rib fracture. When looking at Exhibit B3, Dr. Cohen stated at page 34, that there appeared to be a wedging of either the 4th or 5th dorsal vertebrae, that this was not due to injury but a developmental curvature which is known as scoliosis. He was of the opinion that this had occurred at about growth years 16 or 17.

Given the patient's history and the fact that he had served 35 days in the Army in Israel and was currently on active reserve duty after the accident, and in view of the fractures involved, Dr. Cohen stated that he felt the plaintiff's prognosis was good (page 37). He stated fur-

ther that there would be no relationship between the fractures of the transverse processes and the possibility of future arthritis. Dr. Cohen found that the plaintiff, at the time he examined him, demonstrated a minimal type of partial disability (page 37).

Dr. Cohen stated at page 38, that there was nothing in the Fordham Hospital record that was conclusive with regard to rib fracture. At page 48, Dr. Cohen reiterated that the plaintiff, at the time he examined him, was able to bend completely. At the time the plaintiff was examined by Dr. Cohen, he was not wearing a back brace (page 48). At page 61, Dr. Cohen testified that no surgery was indicated. At page 66, Dr. Cohen was asked to comment upon Dr. Horoszowski's finding that when standing, the patient had scoliosis of the lumbar region to the left 20 degrees prominently on the lumbar part of the spine; the doctor stated that he did not see a scoliosis in the lumbar region, but rather in the dorsal region, and that this predated the date of the accident. At page 69, Dr. Cohen stated that he had seen fractures of the transverse processes of the 3rd and 4th lumbar vertebrae but none of T-4 or T-5.

The next expert medical testimony was offered by Dr. Murray Budabin.

Dr. Budabin is a neurologist at Mt. Sinai Hospital and the Hospital for Joint Diseases. He examined the plaintiff at the behest of the plaintiff's then attending orthopedist, Dr. Robert Zaretsky. Dr. Budabin conducted a neurological examination on March 20, 1975, and a brain scan on April 4, 1975. Dr. Budabin was asked to read from the deposition given by Dr. Horoszowski as taken by Attorney Ben-Bassat in Tel Aviv.

Dr. Horoszowski is authorized to practice orthopedic surgery in Israel (page 115). He had the occasion to

examine this plaintiff on two occasions; first on September 17, 1975 (page 116). He stated that at that time, the plaintiff complained of low back pain which made his normal activities uncomfortable (page 119). The plaintiff had told him that he found himself unable to perform his work due to severe pain which he experienced (page 119). The back pains were the principal complaints of the patient (page 120). Dr. Horoszowki's physical examination disclosed a scoliosis of the lumbar region to the left 20 degrees prominent on the lumbar part of the spine (page 121). Also marked spasm of the paravertebral muscles. Flexion of 30 degrees and extension restricted to zero (page 121). Straight leg raising could be performed up to 40 degrees on the left side and 60 degrees on the right side. There were no pathological findings (page 121). Both legs were normally symetrical with no limp discrepancy. There were no objective neurological signs and the reflex sensibility and muscle strength of the legs were normal. He found no objective evidence of injury of either the ankle or the chest (page 121). The doctor stated further at page 122, that the normal range of flexion of the lumbar spine is 40-60 degrees and that the patient was capable of 30 degrees. X-rays were taken of this patient, by a Dr. Shahan, a radiologist, who reported his findings to Dr. Horoszowski (page 123). It was Dr. Horosowski's opinion that this patient had a compressed fracture of T-4 and T-5 (page 124). In addition to the left transverse fracture of L-3 and L-4 (page 124).

It was his opinion at page 126 that the accident caused these findings. His opinion was that these findings will restrict the plaintiff in his activities at the present time and in the foreseeable future (page 128). He stated that the patient would have to avoid unusual stress and strain on the spinal column (page 128, 129). As to

future medical care, the doctor stated that the most the medical profession could do would be to advise the plaintiff with respect to activity and relieve him symptomatically when pain recurred (page 129). He stated at page 130 that the plaintiff should keep his weight down, because excess weight is an added burden on a damaged spinal column and would tend to increase the frequency and severity of his periods of pain and disability. It was Dr. Horoszowski's opinion that the plaintiff had a 100% permanent partial disability for four months and from approximately April 1, 1975 until he saw the doctor that the plaintiff had a 50% partial disability. He goes on to say at page 132 that with care on the part of the patient, and proper reduction in weight, it was possible that he would remain asymptomatic. There was no indication that this injury would effect adversely the plaintiff's life expectancy (page 132). The doctor stated that most people over 40 years of age develop arthritis and the he seemed to feel that someone who has this type of injury may be more prone to arthritis in later years (page 133). Dr. Horoszowski found the patient's gait to be normal; found him normal neurologically, found his upper extremities, motions, reflexes, motor and sensory abilities normal, page 133, 134. He also found his chest to be normal. He stated at page 134, that he had recommended physical therapy but the plaintiff did not return for treatment.

That concluded the testimony of Dr. Horoszowski on deposition, as read by Dr. Budabin.

Dr. Murray Budabin was then questioned by the plaintiff's attorney. It was his opinion at page 140 that the plaintiff was in an abnormal weight bearing position and because of the pain that he says he has, that this may precipitate arthritic changes. As to the examination that Dr. Budabin conducted of the plaintiff, he stated that

there was just one positive finding which was photophobia. The brain scan that the doctor conducted of the plaintiff was normal (page 142). Dr. Budabin testified that he examined the plaintiff's mental status, cranial nerves, motor and sensory function, and deep tendon reflexes, and he looked for pathological reflexes and came to a conclusion that the plaintiff was normal neurologically (page 143).

Preliminary Statement

The above entitled action was tried before the Honorable Robert J. Ward. U.S. District Judge, and a jury on September 23, and 27, 1976. The jury returned a verdict in favor of the Appellee, Ytzhak Harel, and a judgment was rendered against the Appellant, Harry Diamond, in the amount of $75,000. The execution of this judgment was stayed pending this Appeal.

Thereafter, the Appellant filed a Notice of Appeal to the U.S. Court of Appeals for the Second Circuit, from the aforementioned judgment, on the ground that said judgment was excessive.

Issues Presented

A. Was the judgment awarded Ytzhak Harel excessive?

B. Was the issue of loss of future earnings and diminished earnings capacity, as charged by the trial court, a proper element of damage in this case.

Nature of the Case

This case is a personal injury action. The plaintiff-appellee, a pedestrian, was injured on December 24, 1974, when defendant-appellant's car came into contact with the plaintiff-appellee.

POINT I

The verdict should be set aside as excessive.

(A) The Plaintiff's Recovery for Pain and Suffering Was Excessive.

The verdict of seventy-five thousand obtained by the plaintiff for pain and suffering was excessive and unwarranted. This award is not sustainable on the objective facts. It is simply the result of sympathy and passion and should be set aside or reduced as disproportionate to the injury alleged, and therefore not within reasonable bounds. *Riddle* v. *Memorial Hospital*, 43 A.D.2d 750, 349 N.Y.S.2d 855 (3rd Dept. 1973).

While it is the distinctive province of the jury, in the light of the evidence produced, to determine the nature and extent of the injury to the plaintiff, and to determine the amount of damages to be awarded, there is a limit beyond which the jury should not be allowed to go. The Courts are charged with the duty of seeing that that limit is not exceeded, and may correct a verdict which is plainly excessive. *Tryon* v. *Willbank*, 234 A.D. 335, 255 N.Y.S. 27.

In the case at bar there was no objective testimony to the effect that all of the plaintiff's injuries were permanent. The plaintiff's medical expert, Dr. Horoszowski, stated that plaintiff's chief complaint was back pain, commenting that the plaintiff's other complaints had not caused him to alter his normal life style (120). He further stated that there were no objective neurological signs, (121). This was corroborated by Dr. Budabin (143). The admitting record at Fordham Hospital shows no loss of consciousness (149, 150) nor does it give any finding which would serve as a basis for plaintiff's complaints of headache (64).

It was never conclusively established that the plaintiff in fact had a fractured rib and not merely a contused chest (pages 38, 46 and 56). The note in the Fordham Hospital record regarding rib fracture was a conclusion drawn by a physiotherapist, not by a physician (57, 58, 69, 106, 124). By plaintiff's own admission his headaches disappeared the Summer he returned home (81). The soft tissue injury to his left ankle was transient (123).

The only conclusive diagnosis, with regard to fracture, was that of the Fordham and Trafalgar Hospital records of fracture of the left transverse process of L3 and L4 (86, 87). There is mention of a compression fracture of T5 and T4 in Dr. Horoszowski's deposition at page 124. It should be noted that there was never any record of compression fracture in either the Fordham or Trafalgar Hospital records or any place else. There was no surgery performed on the plaintiff nor was there any testimony offered that surgery would be required in the future. His hospital admissions spanded a three week period, and any treatment he was receiving ceased on his return to Israel. While in Israel he saw Dr. Horoszowski on only two occasions. He did not return, as Dr. Horoszowski had suggested, for physiotherapy (134). The plaintiff wore a 'corset' for three months after leaving Trafalgar Hospital (119). When seen by Dr. Cohen and Dr. Horoszowski he walked unassisted with a normal gait (22 and 133). Dr. Horoszowski testified that with care on the part of the plaintiff with weight loss, the plaintiff could be asymptomatic (132). The degree of permanent partial disability for the future was never conclusively established. Dr. Horoszowski testified that the plaintiff had 100 percent permanent partial disability for four months which was reduced to a partial disability of 50 percent by the time he examined him (131). Dr. Cohen testified that at the time he examined the plaintiff, the plaintiff's disability was "most minimal" (37).

Dr. Horoszowski's comments regarding the possibility of future arthritis (132 and 133) were purely speculative and indefinite as they related to the plaintiff and should not have any bearing on the issue of permanency. There was no reasonable way of telling whether this plaintiff will ever develop arthritis, or if he should, whether it would have been related to this injury. Dr. Horoszowski testified that most people over 40 start to develop arthritis (133). Dr. Cohen's testimony at pages 34 and 35 is in agreement.

It has been held that a wrongdoer can only be responsible for the proximate cause of his wrong. *Milks* v. *McIver*, 264 N.Y. 267, 19 N.E. 487. In the case of *Steitz* v. *Gifford*, 280 N.Y. 15, 20, 254 AD 715. The court said that damages cannot be remote, contingent or speculative. They need not be immediate, but need to be so near to the cause only that they may be reasonably traced to the event and be independent of other causes. The plaintiff's own admission regarding his working in the Army for 35 days after having incurred his back injury bears heavily on the issue of permanency (page 82). He will be in the Army Reserve until age 55 (82). There was no proof offered that he didn't fully perform his assigned Army duties.

The only proper question to be presented to the jury was the amount the plaintiff was to be compensated for past and future pain and suffering. There was no proof of past, present, or future loss of earnings. It is, therefore, respectfully submitted that the Trial Court's charge, which presented for the jury's consideration, loss of future earnings was in error. This point is more fully commented on in subdivision (B) of Point I infra. Since the jury's sole consideration should have been properly limited to the issue of pain and suffering only, this award of $75,000.00 far exceeds what could be considered reasonable and should be set aside as excessive.

Cases dealing with either similar or more severe injuries are in point:

In *Smith* v. *Custom Transport, Inc.*, 451 F. 2d 1313 (1971).

> The plaintiff was injured in an automobile accident which aggravated a pre-existing neck condition and a degenerative arthritic condition. The plaintiff would be required to undergo surgical repair for a lumbar disc. He was awarded $31,500.00.

In *Goudeau* v. *Christ*, 325 F. Supp. 1154 (1971).

> A State Trooper sustained two fractured ribs and a relatively severe neck injury together with a compression of the spinal cord at C3 and C4. This injury resulted in continued pain in the cervical area and could be relieved, but not cured, by continuous use of traction when the pain became severe. This gentleman had no chance of permanent relief unless surgery was performed. He also continued to perform his work duties after the accident. He was awarded $10,000 in pain and suffering.

In *Buchalski* v. *Universal Marine Corp.*, 393 F. Supp. 246 (1975).

> The plaintiff suffered from a permanent and partially disabling injury to his lower back which caused him to experience low back pain radiating to his thigh and testicles. He also experienced difficult sleeping, loss of libido and general malaise. He was thereafter restricted to light duty as a longshoreman. He received a total award of $63,835.99, of which $20,000 was for pain and suffering.

In *McCarthy* v. *Service Contracting Inc.*, 317 F. Supp. 629 (1970).

A derrick hand sustained a compression fracture of 2 vertebrae at L4 and L5; and suffered from pneumonia and a hernia. It was found that it would be medically impossible for him to return to the work of an offshore oil driller. The Court said that he was not entitled to damages for loss of future earnings due to residual back pain which he would experience for the rest of his life. He had a 10 percent permanent partial disability and for this reason, despite the pain, could still work at a job. He was awarded $20,000 for pain and suffering.

In *Princemont Construction Corp.* v. *Smith,* 433 F. 2d 1217 (1970).

A verdict of $91,261.18 was reduced on remittitur to $40,000 for an injury aggravating a congenital condition of the plaintiff's spine. He was thereafter required to wear a lumbosacral support. His prognosis was that he might be precluded from being able to work again as a construction worker. He was able to drive a cab part-time and his earnings were reduced by $60 a week.

Corrao v. *M/V Act III,* 359 F. Supp. 1160 (1973).

This case involved a 39 year old marine worker who sustained a back injury and underwent a laminectomy and surgery for a removal of the nerve. He was hospitalized over 2 months and was not able to work after the accident except on occasional jobs. His earning capacity was reduced to $5,000 a year. He suffered a 15 percent permanent partial injury with future surgery recommended. He was awarded $48,305.00 which was reduced to $12,076 due to his comparative negligence.

Kemerer v. *U.S.*, 330 F. Supp. 731 (1971).

> In this case the plaintiff suffered from headaches, blurred vision and a cerebral concussion. He also incurred flexor extensor injury to the cervical spine. Treatment was required indefinitely into the future. His damages included claims for specials, medicals, impairment of earning power and inconvenience past, present and future. He was awarded $40,000.

In the cases cited, the evidence adduced at trial with regard to permanency was more substantial than in the present case. Also many of these awards included loss of past and future earnings which were calculated on the basis of direct evidence. It is evident, after viewing these cases, that the award for damages in the case at bar for pain and suffering was excessive and unwarranted.

(B) The Court Committed Error in Charging Loss of Future Earnings, and Diminished Earning Capacity.

In order for loss of earnings to be considered as part of an element of damages, it must be pleaded and proved by the plaintiff. *Sinclair Refining* v. *Thompkins*, 117 F. 2d 596. Loss of earnings is not recoverable in an action for personal injuries unless the plaintiff pleads this element of damages and in order to recover for such loss, the plaintiff must show some basis upon which to compute the amount of his loss. He must show with reasonable certainty that he lost the wages in consequence of the injury, and how much they were. See *Neumann* v. *Metropolitan Tobacco Co.*, 189 NYS 2d 600; *Kane* v. *Metropolitan Street R. Co.*, 88 NYS 162; See *Brown* v. *Babcock*, 265 AD 596, 40 NYS 2d 428; *Drinkwater* v. *Dinsmore*, 80 NY 390. If the plaintiff fails to prove the amount of his earnings, he may recover only a nominal sum for loss of

earning. *Camparetti* v. *Union R. Co.*, 95 AD 66, 88 NYS 425.

Loss of earnings was neither pleaded nor proved in this case. There was not one scintilla of evidence produced at trial to the effect that the plaintiff lost one day's pay because of this accident. The Court acknowledged that the plaintiff was not employed at the time of the accident (page 156). Nowhere in this record is there testimony with regard to what the plaintiff earned prior to this accident or after this accident. Yet the Court charged the following:

> Any award you make for diminution of plaintiff's earning capacity by reason of his injuries which were due to the accident should be determined on your finding as to the comparative condition of his health before and after the accident, his prospects for advancement and the probability (343) with respect to his future earnings prior to his injuries, the extent to which you find that those prospects or probabilities have diminished by the injuries, or the length of time that you find plaintiff would reasonably be expected to work had he not been injured, the nature and hazards of the plaintiff's employment and any other circumstances which would tend to increase or decrease plaintiff's earning capacity.
>
> In this connection it is pointed out once again that Mr. Harel would now be twenty-three years of age and has a life expectancy as indicated above, which I have said probably to be 47.8 years, and what is called a work expectancy, according to the same type of tables, of 40.8 years. (156)

Exception was timely taken to this charge (158).

The plaintiff admitted at page 82 putting in 35 days of Army duty as a driver of an armored car, and being in the military reserve subject to call until age 55 (page 82 and 83). There was testimony to the effect that the plaintiff had continued to work as an aircraft mechanic after this injury (page 82). There is also testimony that the plaintiff had been trained as a dental technician (page 22 and 156). There was no testimony regarding what the plaintiff is earning as an aircraft mechanic in Israel, nor was there a claim that because of this injury plaintiff lost any time from his job as an aircraft mechanic.

Plaintiff admits on his pretrial order that no claim was being made for loss of future earnings. See pages 9a and 10a wherein the plaintiff states:

This accident occurred subsequent to the announcement of the "No-Fault Law" in New York.

> Expenses for hospitalization and medical care, as well as for the back support and ambulance service, have been covered in accordance with the provisions of that law, and no claim for these items of damage is made. It frankly is not anticipated that the plaintiff will have medical expenses exceeding the coverage provisions of "No-Fault", which are at least $50,000.00. With respect to lost earnings, the plaintiff had not yet secured employment following his discharge from service, and while no claim has yet been presented for the delay in his obtaining employment following the accident by reason of the injury and his consequent total disability thereafter, this, too, would be presented through "No-Fault". A "serious injury" entitling the plaintiff to sue is claimed on two bases. One basis is that expenses for hospitalization and medical care have exceeded $500.00 and that such expenses were reasonable,

> customary and necessarily rendered. The second basis of claiming the threshold is the issue of permanent partial loss of function of a bodily system or member, namely the spine, and in particular the vertebrae affected and their adjoining vertebrae, together with the consequent effect upon the surrounding soft tissue.

It has been held that one injured by the negligence or wrong of another may recover, not only for the value of the time during which, because of the injury, he was temporarily disabled from working, but also for the diminution, impairment, or loss of earning capacity during his life expectancy, reasonably certain to follow from the injury and for the permanent impairment of the ability to earn money. But such loss must be specially pleaded and proved at the trial. See *Pickett* v. *West Monroe*, 47 AD 629, 63 NYS 30; *Neumann* v. *Metropolitan Tobacco Co.*, 189 NYS 2d 600.

Future earnings must be shown with reasonable certainty. One who is injured may recover loss of time resulting therefrom and the consequental loss of earnings. This rule certainly includes loss of future earnings provided they are not purely speculative in character. The measure of damages if fairly definite and is controlled by what the evidence shows concerning the earning capacity both before and after the injury. *Imperial Oil* v. *Drlik*, 234 F. 2d 4. Nothing in this record even hints at a claim for loss of earnings, past or future.

There is no way of ascertaining what portion of this $75,000 award was given for loss of earnings. This is clearly an instance where a jury in considering the issue of damages violated a rule in determining same by including, on the Court's instructions the issue of unproved loss of future earnings. *Maucere* v. *Munson*, 6 A.D.2d 892, 177 N.Y.S.2d 443.

In view of the erroneous charge given by the Court and the timely exception taken thereto (page 158), the defendant is entitled to have this award set aside and a new trial granted on the issue of damages.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment against appellant, Harry Diamond be set aside and a new trial on the issue of damages granted.

Respectfully submitted,

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Attorneys for Defendant-Appellant

ervice of three (3) copies of
the within Brief
hereby admitted this 21 day
of January 1971

Attorney for